BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KELLI SEVY, Claimant, v. SVL ANALYTICAL, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Surety, Defendants.	**IC 2006-526107** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed January 9, 2013**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue, who conducted a hearing in Coeur d'Alene on February 15, 2012. Claimant was present in person and was represented by Starr Kelso. Employer and Surety were represented by James Magnuson. Industrial Special Indemnity Fund (ISIF) was represented by Thomas Callery. The parties presented oral and documentary evidence. Afterward, the parties submitted briefs. The case came under advisement on September 5, 2012. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

ISSUES

The issues to be decided by the Commission as the result of the hearing are:

1. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;
2. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate;
3. Whether and to what extent Claimant is entitled to:

a. Permanent partial impairment (PPI); and
b. Permanent disability in excess of impairment, including total permanent disability;

4. Whether Claimant is entitled to permanent total disability under the odd-lot doctrine;

5. Whether ISIF is liable under Idaho Code § 72-332; and

6. Apportionment under the *Carey* formula.

At hearing, Defendants waived an issue about whether an accident occurred within the course and scope of employment.

CONTENTIONS OF THE PARTIES

The parties agree that Claimant underwent a cervical fusion, unrelated to her employment, on May 15, 2006, before the accident in question.

Claimant contends that on or about October 31, 2006, she suffered a work-related accident when she tripped over a dog at her workplace. She contends that as a consequence of the subject accident she re-injured her neck such as to require surgical revision of her non-work related C5-6 fusion. Claimant contends that she is totally and permanently disabled as of the date of hearing, and that her total and permanent disability results from the combined effects of the subject accident and certain pre-existing physical impairments, including, inter alia, T12 and L2 compression, cervical spine disease at C4-5 and cervical spine fusion at C5-6. Claimant contends that all elements of ISIF liability have been met for some or all of these pre-existing conditions.

Employer/Surety acknowledges the occurrence of the accident of October 31, 2006, and further acknowledges that as a consequence of the subject accident, Claimant required a "re-do" fusion at the C5-6 fusion site. Employer/Surety acknowledges responsibility for the payment of time-loss and medical expenses associated with the fusion revision

performed by Dr. Larson on or about January 19, 2007. Employer/Surety acknowledges that while Dr. Larson has not seen fit to give Claimant an impairment rating for the effects of the subject accident, Dr. Stevens, to whom Employer/Surety referred Claimant for an Idaho Code § 72-433 exam, has given Claimant a 2% PPI rating for that accident. However, Employer/Surety denies that Claimant has suffered any additional disability as a consequence of the accident or related surgery. Instead, Employer/Surety contends that, to the extent Claimant suffers current disability as a consequence of her cervical spine condition, that disability is entirely referable to Claimant's underlying cervical spine condition, a condition which was not permanently aggravated by the accident of October 31, 2006.

The ISIF contends that Claimant has not met her burden of establishing, as a necessary prerequisite to ISIF liability, that she is totally and permanently disabled. Further, the ISIF argues that the accident of October 31, 2006 did not result in any additional limitations/restrictions related to Claimant's cervical spine. Therefore, Claimant cannot meet her burden of demonstrating that the subject accident combined with the effects of Claimant's documented pre-existing conditions to cause total and permanent disability. Specifically, the ISIF contends that the subject accident caused, at most, a temporary exacerbation of Claimant's pre-existing cervical spine disease, and as of the date of hearing the subject accident was no longer implicated in either causing or contributing to Claimant's cervical spine dysfunction.

EVIDENCE CONSIDERED

The record in the instant case includes the following:

1. The legal file of the Commission;
2. The hearing testimony of Claimant and of Claimant's vocational

expert Dan Brownell;

3. Claimant's exhibits A through D;

4. Defendants' exhibits 1-21;

5. ISIF's exhibit 120; and

6. Post-hearing depositions of SkillTRAN designer Jeff Truthan, physical therapist Mark Bengston, vocational expert Nancy Collins, PhD, and neurosurgeon Jeffrey Larson, M.D.

Objections in depositions are all OVERRULED except as follows:

In Dr. Larson's deposition at page 40, the objection is SUSTAINED.

In Dr. Collins' deposition at page 6, the objection is SUSTAINED in part; those portions of her testimony were obtained by information from post-hearing depositions shall not be considered because they were generated untimely; at page 32 SUSTAINED as hearsay.

FINDINGS OF FACT

Educational/Vocational Background

1. Claimant was born on April 13, 1963. As of the date of hearing, she was 49 years of age. She resided at 103 Elk Creek Road, a rural address in Idaho's Silver Valley.

2. Claimant suffered a traumatic childhood. She dropped out of school just before high school graduation because she did not have sufficient credits to graduate. Since then, she unsuccessfully pursued a GED, her deficient math skills proving to be the most significant obstacle. She has pursued no other significant education or training.

3. Before dropping out of high school, Claimant worked for two summers as an attendant at a gas station located on Lake Powell. She had limited cashiering responsibilities. After leaving high school, Claimant worked as a food server/dishwasher at a restaurant in Ticaboo, Utah.

4. In approximately 1987, Claimant and her husband moved to Winnemucca, Nevada. The couple lived there until approximately 1998 or 1999. While living in Winnemucca, Claimant worked on three separate occasions for the Winners Casino in Winnemucca. She was initially hired to sell change to Casino customers. Thereafter, she was trained to be a blackjack dealer. Though she was evidently successful as a blackjack dealer, she testified that her poor math skills hampered her to some degree in this job. In addition to dealing blackjack, Claimant also dealt craps and roulette. However, due to deficiencies in math skills, she was only allowed to deal outside the pass line on the craps table.

5. In approximately 1998 or 1999, Claimant and her husband moved to Idaho's Silver Valley, where they took up residence at the Elk Creek address. She worked as a homemaker for a few years before obtaining employment at SVL Analytical (SVL) in approximately 2004. At SVL, Claimant was initially employed in the bucking room, where she worked for approximately nine months. Thereafter, she was assigned to shipping and receiving. She testified that she also spent a little time working in the soil digestion lab, and filtering samples. Shortly before the October 31, 2006 accident, Claimant was being trained to input sample information into the computer.

6. Since leaving SVL Claimant briefly worked as a housekeeper. Her only other employment since the subject accident has been as a caretaker for her daughter's three children under the auspices of the Idaho Child Care Program (ICCP).

Pre-Injury Medical History

7. Claimant injured her left shoulder in an automobile mishap occurring when she was 17 years of age. She testified that over time she has developed progressive

arthritic changes in the shoulder. Recently, she underwent a left shoulder injection performed by Dr. Larson. She testified that this injection helped a great deal with the shoulder locking she had been experiencing.

8. In approximately 2000, Claimant suffered a T12 compression fracture as the result of a sledding mishap. As of the date of hearing, she testified that this injury troubled her to some extent; at the end of a busy day she experiences muscle spasms and tightness in her back that she associates with this injury.

9. In August of 2004, Claimant suffered a back injury when she fell from the scooter that she had given to her son for his birthday. For this injury she was evaluated by Glenn Keiper, M.D. Claimant was diagnosed as suffering from an L2 compression fracture. In discussing treatment options with Dr. Keiper, Claimant decided upon proceeding with a repair of the fracture with kyphoplasty, in the hope that this would resolve her discomfort and allow her to return to work more quickly. This procedure was performed on September 14, 2004. It involved injecting a cement into the vertebral body to stabilize the fracture. The procedure did not resolve Claimant's discomfort. Subsequent workup by Dr. Keiper suggested that an L4-5 disc bulge might be implicated in causing Claimant's symptoms. A series of epidural steroid injections were performed by Dr. Magnuson, which provided only temporary relief. When Dr. Keiper left town, Claimant's orthopedic care was assumed by Jeffrey Larson, M.D. Dr. Larson ordered a repeat MRI evaluation of Claimant's lumbar spine. That study, performed on April 19, 2005, demonstrated additional prolapse of Claimant's L4-5 disc space. In addition, the study revealed a small amount of extruded cement at the L2 vertebral body. This extrusion extended into the thecal sac. Dr. Larson posited that this finding could contribute to

Claimant's pain/discomfort. At the time of hearing, Claimant described her low back symptomatology as "huge chronic pain". (Transcript 94/12-95/18). She described constant pain down her legs bilaterally and being unable to stand up straight. These symptoms had a significant impact on her ability to perform her work at SVL:

> Q. Did being in the fixed forward manner when you walked and - - did that impact your ability to lift, carry, do anything like that?
> A. It did, yes.
> Q. How?
> A. Well, I couldn't - - I couldn't pick up buckets and stuff like I, you know once could just pick it up no problem and throw it on a cart. But after the surgery, I would have to slide it and then kind of use my feet or my knees to help me lift it up to the cart, which is only about five or six inches up off the ground. If I could get one corner of the bucket onto the cart, then I could slide it, get the rest of it up on there too.
> Q. So you modified your position. Instead of picking the bucket up, you'd slide it, use your feet, pick it up - -
> A. Yes.
> Q. - - with your foot?
> A. Yes. Or if somebody was around, then I would just, you know – they would come over and help me lift buckets."
>
> Tr. 94/22-95/18.

10. Claimant was seen by Dr. Larson on May 2, 2006 for evaluation of cervical spine pain from which she had been suffering for about a year as of May 2nd. As of the date of her May 2nd evaluation, Claimant presented with complaints of severe neck pain accompanied by left shoulder numbness and tingling as well as difficulty with holding up her right arm. She also complained of intermittent bilateral hand tingling as well. MRI evaluation of Claimant's cervical spine performed on March 24, 2006 demonstrated a broad-based disc bulge at C4-5 that effaced the thecal sac, but did not cause significant spinal stenosis. At C5-6, Claimant was found to have severe degenerative disc disease with mild spinal stenosis with effacement of the left lateral recess. The study demonstrated

moderate left and mild right foraminal narrowing at C5-6. Modic changes were noted at the C5 vertebral body, as well as in the C6 vertebral body, consistent with the degenerative disc disease. Dr. Larson recommended Claimant for an anterior cervical discectomy and fusion at C5-6, hoping that this would alleviate her neck and upper extremity symptoms.

11. Claimant underwent an anterior cervical discectomy and fusion at C5-6 on May 15, 2006. By June 2, 2006, Dr. Larson reported that Claimant suffered a slip and fall approximately eight days after her surgery. She complained of worsening symptoms thereafter, including a burning type sensation along the lateral aspect of her left forearm. By July 6, 2006, Dr. Larson reported that Claimant was doing well. She denied significant neck pain and did not note any radicular type symptoms. On July 6, 2006, Claimant was encouraged to be active and continue with her home exercise program. She was instructed to refrain from repetitive overhead lifting, and advised that her maximal lifting should be at thirty pounds. She was to be seen in three months for a follow-up evaluation.

12. Claimant testified that following the May 15, 2006 surgery, she was eventually returned to work with restrictions against lifting more than 20 to 40 pounds. (Transcript 97/10-13; 98/13-18). When she returned to SVL following the first neck surgery, she did not return to the bucking room. Rather, she returned to work in the shipping and receiving department. (Transcript 100/12-106/20). Claimant's testimony establishes that the work she performed for Employer following the May 15, 2006 surgery, but before the October 31, 2006 accident, was physically less demanding than the job she had performed prior to the May 15, 2006 surgery. She was able to perform this lighter work by employing various strategies to modify the physical requirements of her work, and by seeking the assistance of others. For example, Claimant's husband made for her a stick

with a hook on the end that Claimant employed to drag, instead of lift, sample containers. (Tr. 98/19-100/11).

Accident and Post-Accident Medical Care

13. Claimant's Employer suffered employees to bring their dogs to work. On October 31, 2006, Claimant tripped over a co-worker's dog that was always underfoot. (Transcript 106/25-108/3). The medical record does not reflect whether, as of October 31, 2006, Dr. Larson had pronounced Claimant to be at a point of medical stability following the May 15, 2006 surgery.

14. Claimant returned to Dr. Larson's office on or about November 15, 2006. Dr. Larson's note of that date describes the October 31, 2006 accident, and reflects that of November 15, 2006, Claimant complained of continuous pain in her neck with any movement of her neck. Dr. Larson was concerned that Claimant might have suffered a fracture at the fusion site, and ordered MRI and CT evaluation of Claimant's cervical spine. The MRI, performed on December 5, 2006, demonstrated no change in Claimants C4-5 disc bulge, as compared to the earlier study. A December 5, 2006 CT scan of Claimant's cervical spine showed a lucency along the inferior aspect of the C5-6 bone graft, suggestive of a fractured fusion. Dr. Larson recommended a revision of the C5-6 fusion. That surgery was performed on January 19, 2007. By February 28, 2007, Claimant reported significant improvement in her pre-surgery arm pain. She expressed an interest in returning to work. However, when seen by Dr. Larson on April 24, 2007, she described having difficulty lifting heavy objects, and expressed concern that she would not be able to perform her job because of this. Dr. Larson also noted Claimant's ongoing low back problems related to the L2 kyphoplasty, as well as a right knee problem for which she was

being treated by Dr. McNulty. In this regard, he noted that Claimant had been taking hydrocodone for at least a year prior to the January 19, 2007 neck surgery. Dr. Larson noted that this medication had been prescribed for Claimant by Dr. Miller for her low back and her knee. On exam, Claimant complained of low back pain and told Dr. Larson that she would like to go on disability "for her spine". Dr. Larson stated that he did not believe Claimant to be disabled because of her cervical spine, noting that the fusion appeared to be healing well. He stated that while it might not be reasonable to ask Claimant to lift 70 pounds as of April 24, 2007, she should be able to return to modified duty work in terms of her cervical spine, so long as she avoided lifting more than 40 pounds.

15. Claimant was next seen by Dr. Larson on June 5, 2007. In his note of that date he reported that Claimant returned to work following the April 24, 2007 exam, stating that she had been doing fine. Claimant told Dr. Larson that she had the assistance of a co-worker to help her lift heavy buckets of soil. However, Claimant also told Dr. Larson that about two weeks prior to June 5, 2007, she had begun to experience increasing pain in her neck and arms while riding her mountain bike. Then, a few days prior to the June 5, 2007 evaluation, she fell into a "sink hole" while fishing. She told Dr. Larson that she felt and heard a ping in her neck contemporaneous with her fall, and that since that time she had increased pain in her neck, shoulders and arms, bilaterally. Dr. Larson recommended repeat MRI evaluation of Claimant's cervical spine. In the interim, he released Claimant to return to work with an eight pound lifting restriction, a restriction that Employer was unable to accommodate. The MRI of June 23, 2007, showed a healed fusion at C5-6, but a possible increase in the size of the C4-5 disc bulge, as compared to the previous MRI of March 24, 2006.

16. Dr. Larson felt that Claimant had probably reached maximum medical improvement as of July 10, 2007. He recommended that Claimant undergo a functional capacity evaluation to determine whether Claimant had any permanent work restrictions. Importantly, he noted on that date that "any further treatment of her C spine from this point will more than likely relate to her pre-existing condition. Elaborating on this point in his March 9, 2009 letter to the State Insurance Fund, Dr. Larson stated:

> Ms. Sevy does not have any work restriction related to her neck condition.
>
> She has a history of having an anterior cervical discectomy and fusion at C5-6 on 5/15/2006. She then fell at work and had developed pseudoarthrosis at that level, and had surgery for pseudoarthrosis on January 19, 2007. Any restrictions that she may have, and I don't think there are any related to her neck, would relate to the previous condition for which she had surgery done on May 15, 2006. The second surgery was a supplemental fusion at that same level and would not add any restrictions.
>
> D. Ex. 1, p.9.

Dr. Larson reiterated his opinion in this regard at the time of his April 23, 2012 deposition:

> Q.(by Magnuson) Now, focusing on the C5-6 issue, was there any limitations or restrictions that arose out of when she tripped over the dog at work?
> A. What do you mean?
> Q. Would there be any limitations or restrictions that would be - - I guess were there any limitations or restrictions to her - - from her C5-6 fusion?
> A. I'll have to look and see. It was my opinion that she had been at MMI. I don't know if I did her - - I don't remember if anyone else did. I don't think there are any new limitations to her based on the pseudoarthrosis that I treated.
> Q. Okay. So if she had any limitations or restrictions related to her cervical condition, those would be related to the degenerative condition you treated in May of 2006; is that correct?
> A. If they were at C5-6, yes.
> Q. Okay. So there were no new limitations, restrictions just because of the fusion redo?
> A. No.

Larson deposition 25/23-26/18.

17. Concerning Claimant's ratable impairment for the effects of the October 31, 2006 accident, Dr. Larson did not feel that Claimant was entitled to any additional impairment for that accident, or for the fusion revision required as a consequence of that accident. (Larson deposition 26/19-23).

18. Dr. Larson did not express an opinion on the extent and degree of Claimant's permanent physical impairment for her pre-existing cervical spine condition. Concerning Claimant's low back condition, Dr. Larson did not feel it appropriate to rate Claimant as of the time of his deposition, since he felt that Claimant was not medically stable *vis-à-vis* her L2 kyphoplasty.

19. Craig Stevens, M.D., saw Claimant on October 3, 2007, at the instance of the State Insurance Fund. Dr. Stevens' report reflects that as of the date of his evaluation of Claimant, she had no complaints of neck pain, although she did indicate that she experienced neck pain with overhead work, or while performing lifting. As of the date of his evaluation of Claimant she did have complaints of baseline low back pain, which she rated on a level 4 out of 10, with extension of discomfort into her lower extremities bilaterally. After examining Claimant and reviewing her records, Dr. Stevens proposed that Claimant was at maximum medical improvement *vis-à-vis* her cervical spine condition. He gave Claimant a 12% PPI rating under the Fifth Edition to AMA Guides to the Evaluation of Permanent Impairment. This rating he apportioned between the effects of the subject accident and Claimant's pre-existing cervical spine condition, assigning Claimant a 2% PPI rating for the subject accident and 10% for her pre-existing condition.

20. Concerning Claimant's permanent limitations/restrictions, Dr. Stevens shared

Dr. Larson's belief that the subject accident did not result in any increase in Claimant's limitations/restrictions. In fact, Dr. Stevens was of the view that Claimant's cervical spine condition did not warrant the imposition of any permanent limitations/restrictions. While he acknowledged that the FCE administered by Mark Bengston identified certain limitations/restrictions, Dr. Stevens felt that those limitations are referable in their entirety to Claimant's non work-related thoracic and lumbar spine injuries.

21. Mark Bengston saw Claimant for the purposes of a functional capacities evaluation (FCE) in August 2007. Mr. Bengston testified that the focus of the FCE was to identify limitations/restrictions referable to Claimant's cervical spine condition. However, he acknowledged that the evaluation also identified limitations/restrictions referable to Claimant's thoracic and lumbar spine. Contrary to Dr. Steven's conclusions, Mr. Bengston felt that Claimant demonstrated limitations/restrictions referable to her cervical, thoracic and lumbar spine. Per Mr. Bengston, Claimant's cervical spine condition limits her ability to engage in overhead reaching activities. However, he acknowledged that some of Claimant's upper extremity difficulty may be attributable to her thoracic spine injury. Most of Claimant's restrictions against lifting, carrying, pushing and pulling are referable to her thoracic and lumbar spine injuries. Limitations against stair climbing and walking are referable to Claimant's bilateral knee injuries. Although Mr. Bengston clearly identified certain limitations/restrictions which he felt were referable to Claimant's cervical spine condition, he did <u>not</u> render an opinion on the extent, if any, to which Claimant's cervical spine limitations/restrictions are referable to the October 31, 2006 accident versus Claimant's documented pre-existing cervical spine condition. In all, Mr. Bengston proposed that Claimant is capable of performing all aspects of sedentary and light duty

work, and some aspects of medium duty work as defined in the *Dictionary of Occupational Titles*.

22. Although both Dr. Larson and Dr. Stevens have proposed that Claimant has no permanent limitations/restrictions referable to the October 31, 2006 accident, Claimant testified that following the May 15, 2006 surgery, she enjoyed a good recovery and a recovery of function until the October 31, 2006 accident. Per Claimant, that accident caused a recurrence of her symptomatology which was not relieved by the January 19, 2007 surgery. (Transcript 124/22-127/25).

23. In 2009, Claimant underwent surgical treatment for her C4-5 disc bulge. The parties are in agreement that Claimant's C4-5 lesion and attendant surgery are unrelated to the subject accident.

Vocational Evidence

24. As noted, the results of the FCE administered by Mark Bengston suggest that Claimant has permanent limitations/restrictions referable to her cervical, thoracic and lumbar spine conditions, as well as her bilateral knee injuries. From the results of the FCE, it appears that the most significant limitation/restriction referable to Claimant's cervical spine injury is the recommendation that she avoid overhead reaching activities.

25. The Commission recognizes that Dr. Larson has proposed that the limitations/restrictions identified by Mr. Bengston derive from Claimant's thoracic and lumbar spine injuries, without contribution from her cervical spine condition. To the extent Dr. Larson's' views conflict with the FCE results as explained by Mr. Bengston, the Commission finds Mr. Bengston's testimony to be more persuasive. As noted, however, though Mr. Bengston did feel that Claimant had certain functional limitations attributable

to her cervical spine condition, he did not hazard a guess as to whether those cervical spine limitations were in any way referable to the subject accident, versus Claimant's well-documented pre-existing cervical spine condition.

26. Nancy Collins, PhD. evaluated Claimant's permanent disability at the invitation of Employer/Surety. She did not have the opportunity to interview Claimant, although she did attend Claimant's depositions. Dr. Collins acknowledged that the Kellogg labor market is poor to fair, but nevertheless opined that there are some jobs in Claimant's labor market for which she can compete. Dr. Collins based this opinion on the results of the FCE, which indicated that Claimant is physically capable of performing all aspects of light and sedentary work, and some aspects of medium duty work. Dr. Collins did not feel that Claimant is totally and permanently disabled, but neither did she render an opinion on the extent and degree of Claimant's less-than total disability. She did propose that if one assumes that Claimant is only capable of performing sedentary and light duty work, she has lost access to approximately 35% of her pre-injury labor market. Dr. Collins felt that Claimant's pre-injury labor market reasonably included the Coeur d'Alene area. She acknowledged that if Claimant is unable to engage in overhead-reaching activities then her access to the labor market is more limited. However, she was critical of Mr. Brownell for having subtracted from Claimant's post-accident labor market jobs that required reaching of any type.

27. Mr. Brownell, like Dr. Collins, employed SkillTRAN software to assist him in evaluating Claimant's disability. He testified that this program is merely one of several tools he utilizes in evaluating the impact of an industrial accident on an injured worker's ability to engage in gainful activity. He proposed that when taking into consideration

Claimant's age, education, past work history and transferable job skills, the limitations/restrictions identified following the FCE leave Claimant totally and permanently disabled. Mr. Brownell was critical of Dr. Collins use of the SkillTRAN program, and testified that the assumptions made by Dr. Collins when making inputs into the program resulted in a dramatic understatement of Claimant's loss of access to the labor market. In particular, Mr. Brownell felt that Dr. Collins failed to take into account Claimant's limitations/restrictions against reaching with her upper extremities. Mr. Brownell did not feel it appropriate to include the Coeur d'Alene area in Claimant's reasonable labor market. Mr. Brownell opined that as a result of the combined effects of the October 31, 2006 accident, and Claimant's pre-existing conditions, Claimant was totally and permanently disabled under the odd-lot doctrine. (See Claimant's Exhibit A at 5). In reaching this conclusion, Mr. Brownell acknowledged that he relied only on the results of the functional capacities evaluation; he was aware that both Drs. Larson and Stevens did not feel that Claimant had limitations/restrictions referable to the October 31, 2006 accident, but he chose not to rely on these opinions. (Transcript 304/17-305/11). At the time of hearing, Mr. Brownell elaborated on how he reached the conclusion that the subject accident combined with Claimant's pre-existing condition to cause total and permanent disability:

> Q. What is your opinion, that she is only able to perform services of limited quality, quantity and dependability that no reasonable stable market for those services exists, in support of your opinion that this limitation on ability to find employment is a result - - result of the - - combined result of the accident injury and her pre-accident condition? What is the basis of that statement?
>
> You say they combined. What she had prior to the October 31st, 2006, accident injury combined with what she had after that as developed into FCE by Mr. Bengston in August of 2007?

A. That's exactly it. It's combined to the previous and relying on Mark Bengston and the 2006 injury.
Q. Okay.
A. That combination.

Q. And how do they combine, those two conditions, the - -
A. It's an upper back and lower back. And just simply put, it's a combination. The upper is more concerning to me than the lower was, because of the reaching. Okay. Big factor. Big factor for employment.

Q. After the - - at the time of the FCE in August of 2007, Mr. Bengston documents with his FCE that Kelli Sevy, because of that, was no longer able to perform her jobs - - or the jobs - - two jobs at Silver Valley Labs.
A. Yes.

Q. That situation then was different than what she was doing prior to her accident and injury, correct?
A. Yes.

As noted, Mr. Bengston provided no opinion on the extent to which Claimant's cervical spine limitation is derived from the subject accident versus Claimant's documented pre-existing condition. Mr. Brownell's conclusion that the subject accident did permanently worsen Claimant's condition such as to contribute to her permanent and total disability is based on his belief that Claimant was capable of performing her at time of injury job before the work accident, but is no longer capable of performing that job as a result of the work accident.

DISCUSSION AND FURTHER FINDINGS OF FACT

28. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when

evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

29. Except as qualified below, Claimant is generally credible. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility

PPI

30. Permanent impairment is defined and evaluated by statute. Idaho Code §§ 72-422 and 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry*, 115 Idaho 750, 769 P.2d 1122 (1989); *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975).

31. Dr. Larson's records reflect that he originally had no opinion on the question of whether or not Claimant suffered impairment as a consequence of the subject accident. However, at the time of his deposition he testified that the subject accident and attendant fusion revision did not add any impairment to whatever Claimant's rating might have been for her pre-existing cervical condition. (Larson Deposition 26/19-27/2). He was not asked to elaborate on his thinking in this regard, or to explain if this result would obtain by application of the AMA Guides to the Evaluation of Permanent Impairment. On the other hand, Dr. Stevens did apply the Fifth Edition of the Guides to an evaluation of Claimant's permanent physical impairment. His report persuasively demonstrates a basis for a 12% PPI rating reflecting the totality of Claimant's cervical spine impairment. Further, his report provides a rationale for apportioning this impairment rating between the effects of the subject accident and Claimant's pre-existing condition. Based on Dr. Steven's report,

the Commission concludes that Claimant has suffered a 2% PPI rating referable to the October 31, 2006 accident and attendant cervical spine fusion revision, with a 10% rating referable to the documented pre-existing cervical spine condition.

32. The only medical evidence on the question establishes that Claimant is not currently at a point of medical stability for the effects of her L2 kyphoplasty. From this, the Commission is unable to conclude that Claimant has a ratable permanent physical impairment for her L2 injury which pre-dates the subject accident.

33. There is no evidence of record which would allow the Commission to reach any conclusion concerning whether or not Claimant has a ratable permanent physical impairment for the effects of her T12 compression fracture.

34. Though the record tends to establish that Claimant suffered from symptomatic bilateral knee complaints prior to the subject accident, there is, again, a failure of the medical evidence to establish a ratable permanent physical impairment for Claimant's bilateral knee complaints prior to the date of the subject accident.

Disability

35. **"**Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430.

36. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 766 P.2d 763 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995).

37. Permanent disability is defined and evaluated by statute. Idaho Code § 72-423 and 72-425, *et. seq*. Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See, Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

38. This case involves the issue of whether Claimant's disability should be apportioned between the effects of the subject accident and certain pre-existing conditions. The Idaho Supreme Court recently clarified that apportionment under Idaho Code § 72-406 requires a two-step approach when considering the issue of apportionment in a less than total case. First, Claimant's disability must be evaluated in light of all her physical impairments resulting from the industrial accident and any pre-existing conditions. Thereafter, the Commission must apportion the amount of permanent disability attributable to the industrial accident. *See, Page v. McCain Food, Inc.,* 145 Idaho 302, 179 P.3d 265 (2008). Of course, Idaho Code § 72-406 applies only in less than total cases. A second statutory mechanism exists to apportion responsibility in a case of total and permanent

disability. Once an injured worker has been judged to be permanently and totally disabled, either because she is found to be 100% disabled or by way of the odd-lot doctrine, the Industrial Special Indemnity Fund (ISIF) may be held responsible for some portion of that total and permanent disability if the following elements of ISIF liability are satisfied:

(1) It must be demonstrated that Claimant suffered from a pre-existing physical impairment;

(2) It must be shown that the pre-existing physical impairment was manifest;

(3) It must be shown that the pre-existing physical impairment constituted a subjective hindrance to Claimant's employment; and

(4) It must be shown that the pre-existing physical impairment combined with the industrial accident to cause total and permanent disability. *See, Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990).

39. Accordingly, regardless of whether apportionment is sought under Idaho Code § 72-406 or Idaho Code § 72-332, a necessary first step is the evaluation of Claimant's disability as of the date of hearing. If Claimant is adjudged to be less than totally and permanently disabled, then apportionment can be considered under Idaho Code § 72-406. If Claimant is adjudged to be totally and permanently disabled, then potential ISIF liability is evaluated under Idaho Code § 72-332.

40. Here, neither of the vocational experts retained to provide opinions in this case have rendered opinions on the extent and degree of Claimant's disability. The closest Dr. Collins came to providing an opinion on Claimant's disability was her observation that with light duty restrictions, Claimant has lost approximately 35% access of her time of injury labor market. On the other hand, Mr. Brownell, without rendering an opinion on

Claimant's numerical disability rating, opined that Claimant falls into the odd-lot category, as an individual who is able to perform only services so limited in quality, quantity or dependability that no reasonably stable labor market for those services exists.

41. Careful consideration of the opinions of Mr. Brownell and Dr. Collins leaves the Commission unable to define a specific numerical disability rating based on the totality of Claimant's physical ailments and relevant non-medical factors. The vocational experts' treatment of Claimant's reaching limitations further clouds the issue of Claimant's disability. Dr. Collins testified that the SkillTRAN program she employed did not provide a way to incorporate the Claimant's limitation against overhead reaching. Therefore, she did not include a reaching limitation in her use of the program. Mr. Brownell, on the other hand, appears to have overstated Claimant's reaching limitations in his use of the program, resulting in an inflated assessment of Claimant's disability. While Dr. Collins testified that Claimant has access to at least two-thirds of her pre-injury labor market, she failed to explain whether, or to what extent, Claimant is otherwise qualified to perform the sedentary and light-duty jobs which remain in her labor market. Our synthesis of these opinions is that Claimant's manifold physical injuries, considered in light of her labor market, lack of significant transferable jobs skills and her poor education leave her profoundly disabled, probably in the range of 50-75% of the whole person as of the date of hearing.

Odd-Lot

42. Even though Claimant has failed to establish total and permanent disability by demonstrating that she is 100% disabled, she may nevertheless prove total and permanent disability under the odd-lot doctrine. Claimant may prove her odd-lot status by

showing that she has attempted other types of employment without success, by showing that she, or vocational counselors on her behalf, have searched for other work and other work is not available, or by showing that any efforts to find suitable work would be futile. *See Boley v. State Industrial Special Indemnity Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

43. Claimant cannot qualify as an odd-lot worker under the first prong of the test; she successfully obtained and performed work after recovering from the October 31, 2006 accident. She was employed by the State of Idaho to provide care for three young children under the ICCP program. She successfully performed this work until her daughter was incarcerated. Second, Claimant has failed to produce evidence showing that she, or others on her behalf, have searched for other work for her, but that none is available. Claimant did not conduct a meaningful work search following her recovery, although she was employed by the ICCP from July 2010 through April 2011. What work search she did perform was cursory and performed only in the two months prior to hearing.

44. Finally, we have found that Claimant's testimony concerning the significant worsening of her condition following the subject accident should be given less weight than the opinions of Drs. Stevens and Larson. Claimant is capable of performing all sedentary and light duty work in her labor market, as well as a good deal of work qualifying as medium duty. As Dr. Collins has explained, that Claimant can perform sedentary and light duty work means that she has the physical ability to perform two-thirds of the jobs in the labor market. While we recognize that Claimant is not otherwise qualified to perform roughly two-thirds of the jobs remaining in her labor market, we nevertheless believe that her physical abilities and her skill set are such that it would not be futile for her to look for work in her labor market. Accordingly, we find that Claimant cannot meet her burden of

establishing total and permanent disability under the odd-lot doctrine.

Apportionment

45. Having found Claimant to be less than totally and permanently disabled, we must next consider whether apportionment of the disability is appropriate under Idaho Code § 72-406. Ordinarily, we would be obligated to define, with greater specificity, the extent of Claimant's less than total disability. However, for the reasons explained below, the Commission does not feel it necessary to define the precise extent of Claimant's disability from all causes combined in order to come to a resolution of this matter. Simply, on the evidence before us, we are unable to conclude that except for the addition of a 2% PPI rating, the subject accident did anything to contribute, on a permanent basis, to Claimant's disability.

46. Central to our conclusion in this regard is our assessment that the subject accident of October 31, 2006 did not do anything to increase the functional disability from which Claimant clearly suffered as a result of her pre-existing conditions. As noted above, we have found that Dr. Stevens' report persuasively establishes that Claimant has suffered a 2% PPI rating as a consequence of the October 31, 2006 accident and associated fusion revision. However, in order to determine whether the subject accident has caused additional disability over and above the impairment rating, it is necessary to understand how, or whether, that accident has impacted Claimant's ability to engage in gainful activity. If the subject accident did not cause any change in Claimant's functional ability, i.e., if she was not given any permanent limitations/restrictions as the result of that accident, then it is difficult to support a conclusion that the subject accident has, in any way, contributed to Claimant's disability in an amount over and above the 2% PPI rating to

which she is entitled.

47. Dr. Stevens has proposed that Claimant has no limitations/restrictions whatsoever with respect to her cervical spine condition. Similarly, Dr. Larson, Claimant's treating physician, has testified that if Claimant does have any limitations/restrictions referable to her cervical spine, those limitations are entirely the consequence of the documented pre-existing condition, not Claimant's work accident of October 31, 2006. Dr. Larson also believed that the limitations/restrictions identified by Mr. Bengston in the course of the FCE were referable to thoracic and lumbar spine injuries instead of the October 31, 2006 accident. However, Mr. Bengston clearly testified that certain of Claimant's limitations/restrictions are referable to her cervical spine condition. Importantly, however, Mr. Bengston did not provide any testimony on the question of whether or not, or to what extent, Claimant's cervical spine limitations/restrictions are referable to the subject accident versus Claimant's documented history of pre-existing cervical spine injury. In short, his testimony does not support a finding that Claimant has limitations/restrictions that are referable to the subject accident of October 31, 2006.

48. In the final analysis, the only support in the record for a finding that Claimant's functional abilities were permanently impacted by the accident of October 31, 2006 is found in the testimony of Claimant herself. Claimant testified that the October 31, 2006 accident caused a permanent worsening of her condition. Relying on this testimony, Mr. Brownell found that the subject accident did combine with Claimant's pre-existing conditions to contribute to her disability because Claimant was able to perform her time of injury job before the subject accident and was unable to perform her job following the accident. However, as demonstrated by Claimant's own testimony, she was only able to

perform her time of injury job by adopting a number of strategies to modify the manner in which her work was done. She slid heavy buckets with her foot rather than pick them up. She used a stick and a hook made by her husband to drag heavy items across the floor rather than pick them up. She employed the assistance of others to help her with heavier tasks. She was performing a lighter duty job at the time of the October 31, 2006 accident. In short, there is a dearth of evidence supporting the proposition that without significant accommodation Claimant was, in fact, capable of performing the jobs described in the ICRD JSE's as of the date of the October 31, 2006 accident.

49. We find Claimant's testimony that she experienced a permanent worsening of her condition following the October 31, 2006 accident to be unpersuasive. More persuasive to the Commission is the testimony of Dr. Larson, as supported by his records and objective medical testing. Claimant suffered from non-work related disease of the cervical spine which led to spinal fusion surgery on May 15, 2006. Claimant may or may not have reached a point of medical stability from this surgery by the time the accident of October 31, 2006 occurred. Regardless, although Claimant has successfully demonstrated that the October 31, 2006 accident did cause a fracture of the C5-6 fusion mass, there is no evidence that that accident caused additional injury at levels above or below C5-6. Claimant received appropriate medical care for the C5-6 fracture and follow-up medical records demonstrate a solid fusion at C5-6. Although Claimant has gone on to require additional surgery at C4-5, the parties are in agreement that the subject accident did not contribute to the need for that surgery. Claimant's treating physician has cogently testified that with the successful fusion revision, Claimant has returned to base line without any additional limitations that can fairly be referred to that accident. We find this testimony

persuasive.

50. Even though Claimant's disability is probably in the range of 50-75 percent of the whole person, inclusive of her impairments, we are unable to conclude that the subject accident did anything but cause an additional 2% permanent physical impairment of Claimant's cervical spine. Specifically, the subject accident did not cause any additional permanent limitations/restrictions which could be responsible for contributing to Claimant's disability.

51. Even were we to assume that Claimant is totally and permanently disabled under the odd-lot doctrine, it is clear that Claimant cannot meet her burden of establishing ISIF liability. Our finding that Claimant has failed to demonstrate that she has any limitations/restrictions of a permanent nature which can be referred to the subject accident means that she cannot demonstrate her burden of two of the four elements of ISIF liability.

52. The "subjective hindrance" prong of the test for ISIF liability finds its genesis in the statutory definition of permanent impairment together with additional language enacted by the legislature in 1981:

> "Permanent physical impairment" is defined in section 72-422, Idaho Code, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become employed. This shall be interpreted subjective as to the particular employee involved, however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing permanent physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

Idaho Code § 72-332(2) (emphasis added).

53. The Idaho Supreme Court set out the definitive explanation of the "subjective hindrance" language in *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 172, 686 P.2d

557, 563 (1990):

> Under this test, evidence of the claimant's attitude toward the pre-existing condition, the claimant's medical condition before and after the injury or disease for which compensation is sought, nonmedical factors concerning the claimant, as well as expert opinions and other evidence concerning the effect of the pre-existing condition on the claimant's employability will all be admissible. No longer will the result turn merely on the claimant's attitude toward the condition and expert opinion concerning whether a reasonable employer would consider the claimant's condition to make it more likely that any subsequent injury would make the claimant totally and permanently disabled. The result now will be determined by the Commission's weighing of the evidence presented on the question of whether or not the pre-existing condition constituted a hindrance or obstacle to employment for the particular claimant.

Since we have found that the subject accident did not contribute to Claimant's limitations/restrictions, we find that the October 31, 2006 accident does not constitute a hindrance or obstacle to employment.

54. As part of this prima facie case, Claimant bears the burden of establishing that her pre-existing physical impairments "combined with" her work-related impairments such as to result in total and permanent disability. Claimant bears the burden of demonstrating that she would not have been totally disabled in the absence of her work accident. *See, Garcia v. J.R. Simplot Company*, 115 Idaho 966, 772 P.2d 1973 (1989); *Bybee v. State Industrial Special Indemnity Fund,* 129 Idaho 76, 921 P.2d 1200 (1996). Here, Claimant cannot demonstrate that the subject accident combined with her documented pre-existing conditions to cause total and permanent disability. The subject accident did not result in any additional limitations/restrictions which impacted Claimant's ability to engage in gainful activity.

55. Even if Claimant were found to be totally and permanently disabled under the odd-lot doctrine, she cannot meet at least two elements of her prima facie case against

the ISIF.

CONCLUSIONS OF LAW AND ORDER

1. Claimant is entitled to, and has received, time-loss and medical benefits associated with the accident of October 31, 2006.

2. As a consequence of the subject accident, Claimant suffered PPI of 2% of the whole person. She is entitled to the payment of a rating in this amount at the appropriate rate.

3. Claimant has permanent disability in the range of 50 to 75% of the whole person. Claimant has failed to establish that she has suffered any disability as a result of the subject accident over and above her 2% PPI rating.

4. Claimant has failed to establish that she is totally and permanently disabled under the odd-lot doctrine.

5. Even if it be assumed that Claimant is totally and permanently disabled under the odd-lot doctrine, she has failed to establish the elements of ISIF liability.

6. The issue of *Carey* apportionment is moot.

7. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this __9th____ day of _January_____, 2013.

INDUSTRIAL COMMISSION

/s/_____
Thomas P. Baskin, Chairman

/s/_____
R.D. Maynard, Commissioner

/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _9th_____ day of _January_____, 2013, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

STARR KELSO
P.O. BOX 1312
COEUR D'ALENE ID 83816-1312

H. JAMES MAGNUSON
P.O. BOX 2288
COEUR D'ALENE ID 83814

THOMAS W. CALLERY
P.O. BOX 854
LEWISTON, ID 83501

/s/_____